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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

BRITTIAN PERRY DAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. In a federal mail/wire fraud prosecution in which the defendant proffered neuroscientific evidence that brain damage and depression resulted in cognitive impairments sufficient to negate the mens rea necessary to prove specific intent, did the district court, in its role as gatekeeper, abuse discretion in rejecting the proffered testimony as "unreliable and unhelpful (or irrelevant)" and likely to confuse a jury, because the neuroscientist was not a physician or a psychologist and was thus deemed unqualified to offer explanations and opinions of the impact of damaged brain function on defendant's cognitive abilities.

2. Does the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the district court's rejection of the proffered evidence conflict with the decisions of this Court and other Circuits with respect to the responsibilities and limitations of the gatekeeping function associated with an application of Federal Rule of Evidence 702 to exclude scientific evidence?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

The United States of America and Brittian Perry Day.

Because Petitioner is not a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brittian Perry Day respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on May 9, 2008.

OPINIONS BELOW

The D. C. Circuit's opinion on which the May 9th judgment is based is reported at 524 F.3d 1361, 2008 U. S. LEXIS 10049, a copy of which appears in the Appendix to this petition (App., pp. 1a). The decision and memorandum opinion of the district court entered on May 8, 2006 denying defendant's motion for release pending appeal is reported at 433 F. Supp. 2d 54, 2006 U.S. Dist. LEXIS 26667, a copy of which appears in the Appendix (pp. 36a). The district court's order and opinion entered on February 25, 2005, rejecting defendant's proffered expert testimony, *United States v. Day,* Crim. No. 04-0358, slip. op. (D.D.C. Feb. 25, 2005) is not reported, a copy of which appears in the Appendix (pp. 45a).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered judgment on May 9, 2008. The petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an application of Federal Rule of Evidence 702 which, if found to have been misapplied to exclude relevant and reliable evidence, will involve the Due Process Clause of the Fifth Amendment or the Compulsory Process or Confrontation clauses of the Sixth Amendment for the reason that Petitioner was denied a meaningful opportunity to present a complete defense. FRE 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

STATEMENT OF THE CASE

Petitioner was prosecuted under an indictment charging him with violations of 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 664 (theft from pension and welfare funds), and D.C. Code §§ 22-3221(a) and 22-3222(a)(2)

(common law fraud). The crimes of which the jury convicted Petitioner were cabined in a time frame that began at the end of 1999 and ran to 2004.

Petitioner owned and operated a successful insurance brokerage until the early 1990s, when he fell into a depression following the death of his domestic and business partner, after which he suffered severe physical and emotional damage from the effects of three strokes, in 1996, 1999 and 2001.

Petitioner filed a timely notice that he intended to introduce expert evidence to support his defense that he lacked the mens rea required to prove a specific intent to commit the charged crimes. On December 14, 2004, the district court entered an order granting the Respondent's motion for a psychiatric examination of Petitioner.

On February 18 and 23, 2005, the district court conducted a *Daubert* hearing at which three scientists, Drs. Abbas Alavi, Arthur M. Horton and Edgar Garcia-Rill testified, and on February 25th entered an order rejecting their proffered testimony as unreliable, irrelevant and likely to confuse a jury. Excluded from the trial were scientific explanations to account for the radical changes in Petitioner's behavior and abilities.

Dr. Edgar Garcia-Rill, is a neuroscientist and tenured professor at the University of Arkansas Medical Center, with a long career of research, experimentation, teaching and publishing about the science of the brain and the effects of structural injury and abnormalities on human behavior, who

also runs a brain research center at the University called The Center for Translational Neuroscience (funded and monitored by the National Institutes of Health), where he directs the work of neuropsychologists, physicians, basic scientists, technicians, post-doctoral fellows, and graduate students.

Dr. Abass Alavi, is Professor of Radiology, Neurology, and head of Nuclear Medicine at the University of Pennsylvania Medical Center who, in 1973 with two other neuroscientists, invented a technology called Positron Emission Tomography ("PET") that revolutionized brain imaging by enabling functional imaging to reveal damage to brain structures and its consequent effects on human behavior.

Dr. Arthur MacNeill Horton, Jr., is a neuropsychologist and behavioral scientist who has special expertise in brain-behavior relationships, who teaches medical students at the University of Maryland Medical School, is President of the National Academy of Neuropsychology, a member of the (Maryland) State Board of Examiners of Psychologists and the recipient of the Maryland Psychological Association's 2004 award for outstanding research contribution to psychology, with long experience in working with individuals who have brain injuries, problems relating to the brain, and in testing and assessing behavioral effects and performance of those who have suffered physical and emotional damage to the human neurosystem.

At the *Daubert* hearing on February 18, 2005, Dr. Alavi described the PET scan administered to Petitioner, demonstrated graphically the damage to Petitioner's brain from the strokes and depression, and offered an opinion of the functional effects on Petitioner's activities and behavior of the brain damage, stating, "[a]nd what the result shows is that he has significantly reduced cortical activity . . .[t]hat is the outer layer of the brain. This is the most important part of our brain. This is how we think; this is how we move; this is how we use logic in day-to-day practice of our lives." Asked by the district court to define "what cortical dysfunction is," he replied, "[c]ortical dysfunction means that you're not going to be functioning at the level that is considered normal. Your memory will be impaired; you're not going to be motivated; your logic may not be there. All the higher functions that make us, especially in this sophisticated society, to function cannot be done by someone who has significant loss of cortical dysfunction, which is the case in this particular study."

Dr. Horton described the substantial body of tests he administered to Petitioner, and identified the significance of each with respect to his diagnostic impressions that Petitioner suffered from vascular dementia with depressed mood. Of particular interest to Dr. Horton were Petitioner's "[i]ntellectual cognitive functions, his verbal IQ of 96, his performance IQ of 89, and his full scale IQ of 92. The verbal IQ and full scale IQ fell in an average range; his performance IQ fell in the lower average range . . . For academic achievement, his reading was basically a grade level of high school, a scale of

96, spelling was a scale score of 96, a grade level of eighth grade . . . And for arithmetic, he had a scale score of 90, and a grade level of sixth grade." Petitioner reported to Dr. Horton that his "college grades were A's to A minus." Asked about the regression from As in college to a sixth grade arithmetic skill, Dr. Horton replied, ". . . it's related to the strokes, that he's lost some brain function in terms of his intelligence." Asked on cross-examination whether "the tests do not specifically measure whether an individual can or cannot form a capacity to deceive, correct?" He replied, "[i]f you're meaning their ability to form intentions to do things in the future, to evaluate plans of action and to carry them out, I'd say he had some real difficulties in doing things like that because of the tests I gave. Specifically, those with executive functioning which showed a lot of difficulties. In addition the other ones do. The human brain functioning would include things like making decisions, evaluating, choosing alternatives and carrying out actions, and I'd say he's significantly compromised." Later in the cross-examination he was told, "you have no idea what [Petitioner's] IQ was before the, what you call the vascular dementia, set in?" He responded, "[w]ell, how interesting of you to ask that because, you know, the average person has an IQ of about 100. Most people that graduate from college have an IQ of about 115. . . . So that if someone had graduated with As for a B-A degree, you would expect their IQ to be about 115. . . . So, we have the fact that he was a graduate with As for a B-A degree, so we would say about 115. Add a few points for him having a very successful business over a number of years and being very successful there, you would say

add a few more. Plus you have the Wechsler Memory Scale, a particular measure that is particularly resistant to brain injury that's up at 120, you would say well there are some possible reasons for thinking he might have been quite smarter at one time."

Dr. Garcia-Rill testified about the areas of his expertise, training and experience, and explained how his science was validated by the *Daubert* proof requirements, testing, falsifiability, protocols and error rates, peer review, and general acceptance of neuroscience in the research and diagnostic community in which it operates. In describing the field of neuroscience, he stated that it "has to do with how basically the brain works, but we are a little more specialized now. What we're trying to do is, since we know so much more about the basic science of the brain right now, what our center tries to do is to devise new therapies and new cures. That's why it's called translational." Asked what the precepts of neuroscience are, he replied, "[b]asically what we're trying to find out is how the brain works, how we control the things that we do, how we control our voluntary, deliberate movements." He was twice before qualified to testify in the district court as an expert in brain damage and disorders, "[o]ne time was in Judge Bryant's court in I think in 2001, and the other time was in Judge Urbina's court." Dr. Garcia-Rill tracked his 14-page report, in which he integrated the findings of Drs. Alavi and Horton and concluded with respect to Petitioner that, "These are precisely the parts of the cortex affected by the Major Depression and 'hypofrontality in [Petitioner], in whom volition and conflict decisions are impaired.

Volition is the scientific equivalent of the legal term 'intent.' Therefore, I conclude that Mr. Day's voluntary and deliberate actions were substantially impaired by his medical condition, to the extent that to a high degree of probability he could not have appreciated the repercussions of his actions or purposely intended to violate the law." The district court asked him whether he was a "psychiatrist or a psychologist" or "a medical doctor." Advised that he was a neuroscientist qualified to discuss brain science, the district court stated that because his degree was "not psychiatry and . . . not psychology," but since "[h]e's got doctors who work for him . . . why don't we hear from them?" The district court stated, "[h]e's got a degree in physiology. What is that?" Dr. Garcia-Rill replied, "[p]hysiology is how the brain works. It's neurophysiology . . . I do research on all of these topics . . [s]trokes, depression, pain, everything that we've been talking about here, and the treatment for these . . . one of the issues is, what is the latest information about the brain and these disorders that will allow the fact-finder to make a decision about whether or not these are appropriate scientific findings. And what we know about the brain, for example, in this report, I provided just the latest references, each of which lays 20, 30 references of previous work that show, for example, that in vascular dementia, the depression, the diagnosis of depression is part of the -- when you put with depressed mood, the diagnosis of depression is intrinsic to the vascular dementia."

The district court's response was "if we have a mental disease or defect here, or if we have an

insanity defense, we ought to have a psychiatrist or psychologist, or both."

The district court ruled that Dr. Garcia-Rill could not qualify as an expert witness and that Drs. Alavi and Horton, although qualified as experts, would not be allowed to testify because to be admissible, the science embodied in their testimony needed to be validated by a witness qualified to apply it to an admissible opinion related to the mens rea issue. No serious assessment of Dr. Garcia-Rill's science and no real analysis of its applicability were performed by the district court, which clung to its insistence that only the science of medicine's psychiatric or psychological sub-disciplines could make the testimony of the other two experts relevant and reliable. In an animated statement nearly a month later, the district court revealed the animus that propelled its rejection of and contempt for the neurophysiologist and his science by characterizing him as a "quack."

The issue involved in the defense of the indicted charges was whether depression and strokes causing demonstrable brain damage – holes in critical parts of the brain visualized with highly sophisticated technology – resulted in vascular dementia and impaired the capacity of defendant in the ways that would enable a fact finder to conclude that he could not form a specific intent to commit the crimes. Dr. Alavi explained through the prism of his technology what happens to the behavioral capacity of a person so afflicted, and together with Drs. Horton and Garcia-Rill opined that Petitioner was so afflicted.

Notwithstanding its rejection of the scientific explanations of Petitioner's brain injuries and their impact on his ability to form a specific intent, the district court agreed to keep mens rea in the case. At Petitioner's request and without objection from the Respondent, the jury was instructed that:

> Defendant's theory of the case is that the evidence presented by the prosecution has not proved beyond a reasonable doubt that Mr. Day was able to form the specific intent necessary to commit the crimes with which he is charged, given the emotional confusion caused by the deaths of his partner, James Apicella, and many of his friends, and the illness of Michael Burns, and the physical damage he suffered from strokes in 1996, 1999 and 2000, and that the evidence presented by the government was insufficient to prove beyond a reasonable doubt the remaining elements of the crimes with which Mr. Day is charged in the counts of the superseding indictment.

The jury rejected Petitioner's defense theory and the testimony of non-expert associates and relatives who had observed over the decade at issue his erratic behavior and physical and emotional instability. The witnesses characterized both as inconsistent with his positive character traits, his previous and successful business for many years selling insurance, and his strong and moral

relationships with family and friends over the previous three decades.

Dealing with Petitioner's motion requesting release pending resolution of the appeal, the district court held fast to its principle that Dr. Garcia-Rill and his neuroscience were unqualified to assist the jury in understanding Petitioner's defense. The court held that "[t]he defendant's key witness, Dr. Garcia-Rill, is not a medical doctor but a research scientist, and thus was unqualified to render a diagnosis of any psychiatric or medical condition from which Mr. Day may have been suffering at the time he committed the charged offenses." *United States v. Day*, 433 F. Supp. 2d 54, 56.

In affirming the convictions, the Circuit Court found no abuse of discretion in the district court's conclusion that Dr. Garcia-Rill was the wrong witness for the job, adopting the district court's rationale for rejecting the testimony of the three scientists.

REASONS FOR GRANTING THE WRIT

The Circuit Court's affirmance of the district court's exercise of gatekeeping discretion signals, in Petitioner's view, an intellectually disruptive retreat from the progressive mandate for the evaluation of scientific evidence embodied in this Court's trilogy of seminal decisions that began 15 years ago, *Daubert v. Merrell DowPharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136

(1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

From the outset of the case at issue here, the district court had a fixed idea that Petitioner's mens rea claim was a "medical" condition requiring a "medical" expert – a psychiatrist or psychologist – to direct and supervise the testing and pull the pieces together to offer an opinion calculated to assist the trier of fact to understand the complicated workings of the human brain, a mystery certainly not within a juror's common knowledge and experience. The district court became so fixated that the *Daubert* requirement to "assess the reasoning and methodology underlying the expert's opinion," *id.* at 592-593, was ignored, and the Petitioner's insistence that neuroscience was the province of a neuroscientist drove the district court to a careless, uncivil and unmerited branding of an accomplished scientist as a quack, about as arbitrary and capricious an attack as one might imagine in a federal courtroom. In reaching those conclusions the district court failed to focus on the principles and methodology of neuroscience and rejected out of hand the conclusions that they generated.

But it is not the behavior of a particular judge that makes this case worthy of review by this Court. It is the regressive nature of the decision below and its conflicts with the directions of *Daubert, Joiner and Kumho Tire*, and the decisions of other Circuits. In *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006), the court stated:

> Although the abuse of discretion standard of review is liberal, the district court's decision to exclude the expert testimony creates a "definite and firm conviction that the district court committed a clear error of judgment." *Daubert* makes the district court a gatekeeper, not a fact finder. When credible, qualified experts disagree, a criminal defendant is entitled to have the jury, not the judge, decide whether the government has proved its case.

The analysis offered in *United States v. Mitchell*, 365 F.3d 215, 244-245 (3d Cir. 2004) emphasizes the importance of review in the instant case. The court stated:

> Yet [FRE] Rule 702 and *Daubert* put their faith in an adversary system designed to expose flawed expertise. . . . As the Advisory Committee explained in the context of the December 1, 2000 amendment to Rule 702, "*Daubert* did not work a 'seachange over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'" Fed. R. Evid. 702 advisory committee's note (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996)). *Daubert* itself emphasized the point: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the

burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' 509 U.S. at 596 These trial practices and procedural devices like the directed verdict, "rather than wholesale exclusion under an uncompromising . . . test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702." *Id.* We echoed this in *Paoli II,* where we noted "Rule 702 mandates a policy of liberal admissibility." 35 F.3d at 741. In this context, the court is often referred to as a "gatekeeper." This metaphor is particularly apt because it works two ways: On the one hand, the court must exclude some evidence as a gatekeeper, by "preventing opinion testimony that does not meet the requirements of qualification, reliability and fit from reaching the jury," *Schneider,* 320 F.3d at 404. But on the other hand, the court is *only* a gatekeeper, and a gatekeeper alone does not protect the castle; as we have explained, "[a] party confronted with an adverse expert witness who has sufficient, though perhaps not overwhelming, facts and assumptions as the basis for his opinion can highlight those weaknesses through effective cross-examination." *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002).

CONCLUSION

The decision announced by the Circuit Court in this case is in conflict with decisions of the other circuits and this Court. It adopts a bright line rule for rejecting an otherwise sound and relevant expert opinion based on an arbitrary determination, without the required analysis, that an expert with a different title is required. It sanctions an improperly broad discretion, well beyond the gatekeeping function envisioned in *Daubert, G.E.* and *Kumho*, by which trial courts will increasingly exclude appropriate expert testimony. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Dated: August 6, 2008

APPENDIX

ENTERED MAY 9, 2008

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 25, 2008

Decided May 9, 2008

No. 06-3063

UNITED STATES OF AMERICA,
APPELLEE

v.

BRITTIAN PERRY DAY,
APPELLANT

Consolidated with
06-3076

Appeals from the United States District Court
for the District of Columbia
(No. 04cr00358-01)

John W. Karr argued the cause for appellant. With him on the briefs was *Theodore S. Allison.*

Sarah T. Chasson, Assistant U.S. Attorney, argued the cause for appellee. With her on the briefs were *Jeffrey A. Taylor*, U.S. Attorney, and *Roy W. McLeese, III*, Assistant U.S. Attorney.

Before: TATEL and GARLAND, *Circuit Judges*, and EDWARDS, *Senior Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge:* Appellant Brittian Perry Day was indicted on multiple counts of mail fraud, wire fraud, and theft/embezzlement in violation of federal law, and one count of first degree fraud in violation of the District of Columbia Code. He was charged with stealing more than $1.5 million by defrauding various employee benefit plans and one charity after he was retained by these institutions as an insurance broker. Day claimed that he lacked the requisite *mens rea,* because physical and emotional damage to his body and brain had rendered him unable to form the intent to defraud or deceive, and he proffered expert testimony to support this defense. The District Court, however, declined to admit certain of this expert testimony. *United States v. Day,* Crim. No. 04-0358, slip. op. (D.D.C. Mar. 29, 2005); *United States v. Day,* Crim. No. 04-0358, slip. op. (D.D.C. Feb. 25, 2005). On April 20, 2005, after a jury trial, appellant was found guilty on six counts of mail fraud under 18 U.S.C. § 1341; ten counts of wire fraud under 18 U.S.C. § 1343; five counts of theft or embezzlement from an employee benefit plan under 18 U.S.C. § 664; and one count of fraud in the first degree under D.C. Code §§ 22-3221 and 22-3222. *See United States v. Day,* 433 F. Supp. 2d 54 (D.D.C. 2006). The District Court denied the Government's request to subject appellant to criminal forfeiture for

his mail and wire fraud offenses, and refused to order a forfeiture money judgment on the theft/embezzlement offenses. *United States v. Day*, 416 F. Supp. 2d 79 (D.D.C. 2006). Appellant was sentenced to an aggregate term of imprisonment of 108 months, after which the District Court denied his motion for release pending appeal. 433 F. Supp. 2d at 55 (denying Day's motion "because his appeal . . . [did] not raise a substantial question of law or fact likely to result in reversal, a new trial, or a reduced sentence of imprisonment").

Appellant now challenges the District Court's decisions to exclude the expert testimony relating to his mental state; he also contests his sentence on the ground that the District Court incorrectly calculated his base and adjusted offense levels. The Government cross-appeals, claiming that the District Court erred in holding that the Government was not entitled to forfeiture on the mail and wire fraud charges, and also in denying entry of a money judgment on the charges to which the Government was entitled to forfeiture. We reject appellant's appeals, and uphold both the District Court's decisions to exclude the disputed expert testimony and the sentence imposed by the court. However, we reverse the District Court decisions denying the Government's requests for forfeiture and a money judgment.

BACKGROUND

Over a 10-year period starting in 1994, Brittian Perry Day caused losses of $1.5 million to multiple employee benefit plans ("the Plans") and to

a charity called Food and Friends ("F&F"). Appellant was retained by the Plans and by F&F to procure insurance for them and their trustees. The Plans mailed appellant checks, payable to appellant's wholly-owned insurance company (the "A&D Insurance Agency"), to cover the cost of purchasing the policies that he recommended to them. However, instead of actually obtaining insurance policies for the Plans or F&F, appellant deposited the proceeds into an account held in the name of the A&D Insurance Agency and spent the money on himself. When the Plans asked appellant for evidence of their coverage, he faxed them fake coverage declarations. He also sent the Plans fake renewal applications and reminders to the Plans, and contacted the Plans' billing departments to request prompt payment. Appellant also created fake declaration pages by covering over the old policy terms with correction fluid and retyping them with new policy numbers. When the Federal Bureau of Investigation ("FBI") searched appellant's home, where his business was located, it found blank declaration pages, declaration pages with "wite-out" on them, and notebooks documenting his activities.

In July 2002, after one of the Plans incurred a claim that should have been, but was not, covered by the insurance it had obtained from appellant, it quickly discerned that it had no insurance. The Plan notified the Department of Labor, which began investigating appellant's business conduct.

In December 2003, F&F purchased what it thought was a pre-paid, three-year insurance policy through appellant. By February 2004, F&F had

written $300,000 in checks to A&D Insurance Agency, unaware that appellant had obtained only a one-year policy for F&F that cost approximately $100,000. F&F did not learn until August 2004 that appellant was the subject of a criminal investigation.

The evidence at trial also indicated that appellant had taken steps to protect his ill-gained assets. In July 2002, appellant directed his sister to open a bank account under the name of a fictitious company called Northern Cape Insurance Associates, because he was afraid the FBI was going to seize his other accounts. Thereafter, appellant did business through that bank account. Appellant asked another individual to conceal the existence of his ownership of several beach homes in Rehoboth Beach, Delaware by hiding documents revealing his ownership interests in the homes and saying nothing to the FBI about his interests. The Government contended that these actions "helped appellant hide his assets from forfeiture, minimized his civil liability to the Plans, and gave the appearance of impoverishment, which, in his mind, might persuade the Government not to take significant criminal action against him." Br. for Appellee at 6.

Appellant's defense was that "the depression that followed his [business and domestic] partner's death [in 1990], coupled with business reverses . . . and severe physical and emotional damage to his body and brain associated with the depression, vascular dementia, three strokes, in 1996, 1999 and 2001, left him sufficiently impaired that he lacked the mens rea to form the specific intent to commit the crimes of which he was convicted." Br. for

Appellant at 5. To bolster his defense, appellant proffered the testimony of four expert witnesses who he claimed would attest to his inability to form the requisite *mens rea* to commit the crimes as charged. On February 24, 2005, after a three-day *Daubert* hearing, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to determine whether the proffered expert testimony was relevant and reliable enough to be admitted as evidence, the District Court excluded the first three witnesses - Drs. Abbas Alavi, Arthur Horton, and Edgar Garcia-Rill. On March25, 2005, after a two-day *Daubert* hearing, the District Court excluded the testimony of the final expert witness, Dr. Michael Spodak. However, the trial judge allowed some friends, relatives, and associates of appellant to testify at trial about "their observations of [appellant's] physical, mental and emotional deterioration over the decade following his partner's death and the apparent changes in his capacity to deal with routine business and social activities after his strokes began in 1996." Br. for Appellant at 17. On April 20, 2005, the jury found appellant guilty on all counts.

The Government's superseding indictment filed on August 27, 2004 included forfeiture allegations; the Government originally sought forfeiture of appellant's primary residence in Washington, D.C., his beach home in Rehoboth Beach, Delaware, and his Mercedes-Benz automobile. The Government also sought entry of a money judgment against appellant in the amount of $1.5 million - the total sum of money allegedly constituting or derived from proceeds of appellant's

crimes. After the jury rendered its guilty verdict on the substantive charges, appellant waived his right to a jury trial on the Government's forfeiture claims. The Government asked the District Court to enter the money judgment of $1.5 million and to order the forfeiture of appellant's primary residence as a substitute asset under 21 U.S.C. § 853(p) in satisfaction of the money judgment. Counsel for Mr. Day did not challenge the total amount sought by the Government in forfeiture, arguing instead that there was no basis in criminal forfeiture law for the Government to obtain a personal money judgment against appellant, and that the mail and wire fraud statutes cited in support of the Government's forfeiture claim did not apply to the offenses of which appellant had been convicted.

On February 22, 2006, the District Court ruled in appellant's favor on the forfeiture issues, holding that the mail and wire fraud statutes did not support a criminal forfeiture action against appellant for his crimes, and that although criminal forfeiture was appropriate for the money stemming from the theft/embezzlement charges, the applicable statutes did not allow the District Court to enter a money judgment. 416 F. Supp. 2d at 87, 91. On April 6, 2006, the District Court sentenced appellant to an aggregate term of 108 months' imprisonment. This appeal and cross-appeal followed. Day appeals the District Court's decisions to exclude the disputed expert testimony and the District Court's calculation of his sentence. The Government cross-appeals the District Court's decisions rejecting forfeiture and denying it a money judgment, claiming that criminal forfeiture is available for the mail and wire fraud

charges, and also that entry of a money judgment is appropriate when criminal forfeiture is involved.

ANALYSIS

I. STANDARDS OF REVIEW

We have made it clear that, under Federal Rule of Evidence 702, "[a] district court has broad discretion regarding the admission or exclusion of expert testimony, and reversal of a decision on these matters is appropriate only when that discretion has been abused." *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567 (D.C. Cir. 1993). This standard of review complies with the Supreme Court's admonition that in reviewing challenges to the admissibility or exclusion of expert testimony, appellate courts must afford trial judges great discretion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997). The Court has also made it clear that, under *Daubert*, trial judges have "broad latitude to determine" the "reliability" of expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153 (1999). Even when a trial court's decision to exclude expert testimony is based on a party's failure to comply with rules of discovery, the matter still requires "an exercise of discretion by the trial court." *United States v. Johnson*, 970 F.2d 907, 910 (D.C. Cir. 1992).

Our review of the District Court's sentencing decisions is guided by a three-part test. "Purely legal questions are reviewed *de novo;* factual findings are to be affirmed unless 'clearly erroneous'; and we are to give 'due deference' to the district court's

application of the guidelines to facts." *United States v. Goodwin*, 317 F.3d 293, 297 (D.C. Cir. 2003) (alteration, other internal quotation marks omitted).

The District Court's constructions of the applicable statutes covering criminal forfeiture - which implicate when criminal forfeiture is an appropriate penalty and whether money judgments are an appropriate means of enforcing criminal forfeiture - are legal conclusions that we review *de novo*. *See United States v. Vampire Nation*, 451 F.3d 189, 198 (3d Cir. 2006); *United States v. Casey*, 444 F.3d 1071, 1073 (9th Cir. 2006).

II. THE DISTRICT COURT'S EXCLUSION OF EXPERT TESTIMONY

A. Exclusion of Testimony Under Federal Rule of Evidence 702

On February 25, 2005, the District Court issued an order excluding the testimony of Drs. Horton, Alavi, and Garcia-Rill on the grounds that it was

> unreliable and unhelpful (or irrelevant) under the requirements embodied in Rule 702 of the Federal Rules of Evidence and the Supreme Court's decision in *[Daubert]*. . . . [T]he Court also finds that the proffered testimony fails to pass muster under the case law governing the limited circumstances in which *mens rea* testimony is permitted by the courts, as articulated by this

> Circuit in *United States v. Childress*, 58 F.3d 693 (D.C. Cir. 1995).

Day, slip. op. at 1-2 (Feb. 25, 2005). Because we find that the exclusion was appropriate under the Federal Rules of Evidence ("FRE"), we need not address the District Court's alternative rationale for the exclusion.

The exclusion of Dr. Garcia-Rill's testimony was the primary issue in the District Court. As the trial judge explained, "Dr. Alavi and Dr. Horton[] did not purport to offer any diagnosis of Mr. Day, but simply reported and explained the results of examinations . . . they had conducted on him. Their expert testimony thus did not stand alone; rather, Dr. Garcia-Rill incorporated their results into his 'diagnosis' of Mr. Day." *Day*, 433 F. Supp. 2d at 56 n.2. Put another way, the trial judge described the three experts as "three legs of a stool, and the stool cannot stand unless all three legs are there. And Dr. Garcia-Rill is the weak leg in the stool." Hearing Tr. (2/24/05) at 39. Day does not dispute that if, as the District Court found, Dr. Garcia-Rill's testimony was properly excluded under FRE 702, then it follows *a fortiori* that the proffered testimony from Dr. Alavi and Dr. Horton was also properly excluded.

FRE 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

> knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702. In *Daubert*, the Supreme Court explained that, in applying FRE 702, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. Scientific testimony is reliable if it is based on "'scientific . . . knowledge.' The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation." *Id.* at 590 (footnote omitted). In short, "[p]roposed testimony must be supported by appropriate validation - *i.e.*, 'good grounds,' based on what is known." *Id.*

Daubert does not require that "judges become scientific experts, much less evaluators of the persuasiveness of an expert's conclusion." *Ambrosini v. Labarraque*, 101 F.3d 129, 134 (D.C. Cir. 1996). However, in applying FRE 702, trial judges should focus on experts' "principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. Although *Daubert* lists a number of factors that a court may consider in determining whether to admit or exclude expert testimony, the Supreme Court made it clear that "[t]he inquiry

envisioned by Rule 702 is ... a flexible one. Its overarching subject is the scientific validity - and thus the evidentiary relevance and reliability - of the principles that underlie a proposed submission." *Id.* at 594-95.

Finally, a district court's admission or exclusion of evidence under FRE 702 is subject only to limited review:

> The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable. Our opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." 522 U.S. at 138-139. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's

> reliability arises. . . . Thus, [under *Daubert,* an assessment of the reliability of expert testimony] in a particular case is a matter that the law grants the trial judge broad latitude to determine.

Kumho Tire, 526 U.S. at 152-53. Given these legal standards, we find that the District Court's decision to exclude Dr. Garcia-Rill's testimony was not an abuse of discretion.

Dr. Garcia-Rill's report concluded that

> Mr. Day's clinical Depression, demonstrated brain damage, and decreased blood flow contributed to impaired critical judgment in daily decisions. . . . There is considerable evidence showing that the frontal lobes in man are responsible for volition, that is, the performance of deliberate actions. . . . These are precisely the parts of the cortex affected by the Major Depression and "hypofrontality" in Mr. Day, in whom volition and conflict decisions are impaired. Volition is the scientific equivalent[] of the legal term "intent." Therefore, I conclude that Mr. Day's voluntary and deliberate actions were substantially impaired by his medical condition, to the extent that to a high probability [he] could not have appreciated the repercussions of his

> actions or purposely intended to violate the law.

Joint Appendix ("JA") (Vol. 1) at 165 (Garcia-Rill Report). However, the bases underlying Dr. Garcia-Rill's conclusions were tenuous at best. The doctor's report and findings were premised in large part on the idea that appellant suffered from "Major Depression" - a conclusion that was not supported by appellant's medical records nor established by the other two experts. Dr. Garcia-Rill admitted on cross-examination that there was no psychiatric evidence of depression, such as an actual diagnosis from a clinician or evidence that appellant was prescribed antidepressants. As a neuroscientist (as opposed to a psychologist or psychotherapist), Dr. Garcia-Rill was unable himself to diagnose Day as having depression. Hearing Tr. (2/23/05) at 85-97. The trial judge thus found that Dr. Garcia-Rill's testimony was generally unreliable, stating that "[t]here' s no predicate that's reliable for his conclusions. They don't exist in what he says he relies on. ... He made basic mistakes in his report, [mistakes about] the kind of medication that Mr. Day was on, [his] refusal to consider [Day' s] past behavior in the outside world, the definition of the kind of depression it was." Hearing Tr. (2/24/05) at 55.

Most important, the District Court found that Dr. Garcia-Rill's testimony failed to illuminate Day's condition prior to any of the experts' examinations of Day in 2004. The indictment against Day alleged that "[f]rom in or about March, 1994, and continuing through in or about August, 2004, [Day] devised and intended to devise a scheme and artifice to defraud

and to obtain money and property by means of false and fraudulent pretenses, representations, and promises." JA (Vol. 1) at 52 (Superseding Indictment). The specific crimes of which appellant was convicted involved fraudulent behavior spanning 1999-2004. Even assuming, *arguendo*, that Dr. Garcia-Rill's conclusions were an accurate assessment of Day's mental capabilities in 2004, there was no concrete physical evidence of any specific impairment (or the degree of impairment) Day suffered during the earlier years of his unlawful scheme. The trial judge thus found that Dr. Garcia-Rill "does nothing more than surmise or speculate as to what Mr. Day's condition may have been at any time prior to his November, 2004, exam by Dr. Horton." Hearing Tr. (2/24/05) at 55. The trial judge noted further that "all of the testimony, as Dr. Alavi and Dr. Horton candidly admit, all relate to Day's condition in 2004 and 2005. . . . Dr. Alavi categorically declined to make any assessment of Mr. Day's brain condition at any time before [Dr. Alavi conducted his Positron Emission Tomography] scan." *Id.* at 57. In other words, even if the experts had made a compelling case that Day lacked the ability to form the intent to deceive as of 2004, they were unable to say that Day lacked this ability in 1994, when the scheme first originated, or in 1999, when the earliest fraud specifically alleged in the indictment began.

Given the problems with Dr. Garcia-Rill's conclusions - and the temporal limitations of the expert testimony from Drs. Alavi and Horton, on which Dr. Garcia-Rill's conclusions were based - the District Court concluded that the experts' testimony

had to be excluded under FRE 702 and *Daubert*. The trial judge found that the expert testimony would "confuse the trier-of-fact," that it was not "the product of reliable principles and methods," and that the witnesses had not "appl[ied] the principles and methodology reliably to the facts of the case." *Id.* at 59-60. The trial judge's determination that the proffered expert testimony "really goes beyond anything that would meet the *Daubert* test and be reliable," *id.* at 60, was not an abuse of discretion.

B. Exclusion of Testimony Under Federal Rule of Criminal Procedure 16

On March 29, 2005, the District Court issued an order excluding the testimony of Dr. Michael Spodak on the grounds that the defense had failed to comply with Federal Rule of Criminal Procedure 16(b)(1)(C)(ii), and, in the alternative, held that "the proffered evidence fails to comply with the standards for admissibility set forth ... in ... *United States v. Childress*, 58 F.3d 693, 730 (D.C. Cir. 1995)." *Day*, slip. op. at 1 (Mar. 29, 2005). The District Court has made clear, however, that "the *primary* ground for exclusion was defendant's failure to comply with Rule 16." *Day*, 433 F. Supp. 2d at 58. Because we find that the District Court did not abuse its discretion in excluding the expert testimony under Rule 16, we need not address the alternative basis for the exclusion.

Rule 16 governs discovery and disclosure in criminal proceedings, and states in relevant part that if "the defendant has given notice under

[Federal Rule of Criminal Procedure] 12.2(b) of an intent to present expert testimony on the defendant's mental condition," FED. R. CIM. P. 16(b)(1)(C)(ii), then the defendant also "must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial." FED. R. CRIM. P. 16(b)(1)(C). This summary "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." *Id.*

After appellant filed his notice under Rule 12.2 on November 17, 2004, the Government repeatedly requested discovery regarding appellant's mental condition. Nevertheless, it was only at the status conference on January 25, 2005 that the Government learned the names of the three experts that appellant intended to call as witnesses. Hearing Tr. (1/25/05) at 35-37. The Government then filed a motion on January 26, 2005 to compel production of the expert reports submitted by Drs. Horton, Alavi, and Garcia-Rill because the defendant had not made them available. JA (Vol. 1) at 88-93. The Government received Dr. Garcia-Rill's report only approximately 48 hours before the scheduled *Daubert* hearing. *See* Hearing Tr. (3/25/05) at 6-7. After the District Court excluded the testimony of the first three experts, the Government filed a motion on March 7, 2005 to strike appellant's Rule 12.2 Notice and to exclude expert testimony concerning appellant's mental condition, because appellant had not yet identified an expert who could testify at the trial that was scheduled to begin three weeks later. A week later, at a March 14, 2005

hearing on the Government's motion, defense counsel announced that appellant had retained Dr. Spodak to testify instead of Dr. Garcia-Rill. The Government received Dr. Spodak's report on March 17 and moved to strike it because the two-page report was so vague that it did not meet the standards set forth in Rule 16. See JA (Vol. 1) at 203-04 (Spodak Report). The District Court proceeded to hold a *Daubert* hearing on March 21 and 24, 2005, to determine whether to admit Dr. Spodak's testimony. It was only during the Government's cross-examination on March 24, 2005 that Dr. Spodak finally offered a diagnosis of appellant's mental condition. Hearing Tr. (3/24/05) at 16-17, 53. The District Court granted the Government's motion to exclude Dr. Spodak's testimony on March 25, 2005, primarily as a sanction for violating Rule 16.

We hold that the District Court did not abuse its discretion when it excluded Dr. Spodak's testimony. There are several compelling reasons that support this conclusion. First, Dr. Spodak's report did not meet the requirements of Rule 16. The District Court correctly pointed to the Advisory Committee comments to the 1993 Amendments to Rule 16 - amendments that had included the addition of Rule 16(b)(1)(C) - during his discussion of the deficiencies of Dr. Spodak's report. Hearing Tr. (3/25/05) at 11-12. The Advisory Committee stated that under the new amendments, "the requesting party is to be provided with a summary of the bases of the expert's opinion.... That should cover not only written and oral reports, tests, reports, and investigations, but any information that might be

recognized as a legitimate basis for an opinion under [FRE] 703, including opinions of other experts." FED. R. CRIM. P. 16 advisory committee's note (1993 amendments). Although Dr. Spodak's report provided a page-long list of tests he had performed on Day, interviews he had conducted, and other expert reports he had read, the report failed to state what Dr. Spodak had concluded from any individual test result, interview, or expert report. That failure, in combination with the absence of a clinical diagnosis in the report, made it virtually impossible for the Government to engage in meaningful cross-examination at the *Daubert* hearing. "Upon receipt of Dr. Spodak's report, the government knew no more about appellant's alleged mental deficiencies than it did when appellant filed his Rule 12.2 notice four months earlier." Br. for Appellee at 32. Given that the purpose of Rule 16(b)(1)(C) is to "minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination," FED. R. CRIM. P. 16 advisory committee's note (1993 amendments), the District Court did not err when it determined that Dr. Spodak's report violated Rule 16.

Second, it was not an abuse of discretion for the District Court to conclude that the appropriate sanction for the Rule 16 violation was the exclusion of Dr. Spodak's testimony. Trial courts have the discretion to weigh various options in deciding how to address a party's violation of a discovery rule. "If a sanction is thought necessary [under Rule 16], it is for the court to decide whether to order a

continuance, or to prohibit the party from introducing in evidence the material not disclosed, or to make whatever other order it deems just under the circumstances." CHARLES ALAN WRIGHT, 2 FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 260, at 196-201 (3d ed. 2000) (footnotes omitted). The Supreme Court has held that exclusion of evidence and testimony can be a proper sanction, even against a criminal defendant. *Taylor v. Illinois,* 484 U.S. 400, 414-16 (1988). Moreover, we have rejected the suggestion that *Taylor* requires a trial court to conduct "some sort of 'least restrictive alternative' analysis" before excluding evidence as a sanction. *Johnson,* 970 F.2d at 911.

In Johnson, we specifically held that, in order to justify the exclusion of evidence as a sanction for failure to comply with a discovery rule, the trial judge need not find that the noncomplying counsel acted in "bad faith." *Id.* We remanded the case in *Johnson* only because the trial court judge had gone out of his way to praise the *good faith* efforts of the noncomplying attorney. Although this court stated that it "could normally affirm on [the *Johnson*] record," the fact that "the [trial] judge's only factual finding (good faith of counsel) [was] slightly counter to the decision to exclude" caused us to remand the case to allow the trial judge to expressly exercise the discretion afforded under *Taylor. Id.* at 912.

In this case, unlike the circumstances under review in *Johnson,* the District Court did *not* believe that Day's counsel had acted in good faith. Indeed, when he granted the Government's motion to exclude Dr. Spodak's testimony, the trial judge

stated that this case involved "willful conduct on the part of the defense. And judgments were made along the way that were either intended to or had to be understood as having the effect of putting the government in a box that was prejudicial and unfair and which had an impact [on] the integrity of the adversary process." Hearing Tr. (3/25/05) at 14; *see also Day*, 433 F. Supp. 2d at 57 (stating that the defendant had "failed manifestly to comply" with Rule 16). As noted above, Dr. Spodak' s tardy report did not meet the standards of Rule 16 and he offered no diagnosis until less than a week before trial. In these circumstances, the District Court did not abuse its discretion in excluding Dr. Spodak's testimony.

III. SENTENCING

Appellant claims that the District Court made several errors in calculating his sentence under the United States Sentencing Guidelines ("U.S.S.G."). For the reasons indicated below, we find that none of appellant's claims has any merit.

A. Base Offense Level

Under U.S.S.G. § 2B1.1(a)(1), appellant's base offense level was 7. However, the District Court increased the offense by 16 levels under U.S.S.G. § 2B1.1(b)(1)(I) after finding that appellant was responsible for losses of more than $1 million. Appellant contends that, because the trial judge's loss determination was substantially more than the total loss alleged in the counts included in the superseding indictment, the base sentencing level

was erroneous and violated his Fifth Amendment right to due process. Appellant's claim fails for two reasons.

First, the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), rendered the Sentencing Guidelines advisory, and stated that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Id.* at 233. Appellant's sentence of nine years fell considerably below the statutory maxima for mail and wire fraud (thirty years) and was well within the District Court's sentencing discretion. 18 U.S.C. §§ 1341 and 1343.

Second, after the trial judge determined the "appropriate offense guideline" under U.S.S.G. § 1B1.2(b), he had discretion to reasonably determine "relevant conduct" as defined in U.S.S.G. § 1B1.3. "Relevant conduct," for the purposes of the base offense that appellant was charged with, includes conduct that is "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). We defer to the District Court's determination of what constitutes "the same course of conduct or common scheme," "[b]ecause the question of whether conduct in a given case constitutes a 'course of conduct' is inherently fact intensive." *United States v. Jackson,* 161 F.3d 24, 28 (D.C. Cir. 1998). Moreover, "relevant conduct" only needs to be established by a preponderance of the evidence for the trial judge to permissibly take said conduct into account in a sentencing determination.

United States v. Dorcely, 454 F.3d 366, 371-3 (D.C. Cir. 2006). The trial judge's findings were neither clearly erroneous, contrary to law, nor an abuse of discretion. We therefore hold that the trial judge committed no error in determining that appellant had caused a loss greater than $1 million and in increasing appellant's base offense level.

B. Obstruction of Justice

The Sentencing Guidelines advise that a trial judge may increase a defendant's sentence by two levels if it is determined that the defendant "willfully obstructed or impeded, or attempted to obstruct or impede" the administration of justice with respect to the investigation. U.S.S.G. § 3C1.1. It does not matter that a defendant was not separately charged with obstruction of justice. U.S.S.G. § 1B1.4 states that, "[i]n determining the sentence to impose within the guideline range . . . the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." Given the testimony by Government witnesses about the lengths to which appellant had gone to hide his income and assets, the District Court's determination that appellant was guilty of the obstruction of justice was not error under the due deference standard.

C. Abuse of Trust

The Sentencing Guidelines also advise that a trial judge may increase a defendant's sentence by two levels if it is determined that the defendant

"abused a position of public or private trust ... in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3; *see also* U.S.S.G. § 3B1.3 app. n.1. Whether Day abused a position of trust within the meaning of U.S.S.G. § 3B1.3 is a question of law that we review *de novo*. *United States v. West*, 56 F.3d 216, 219 (D.C. Cir. 1995). We have already determined that appellant operated as a fiduciary of the employee benefit plans he embezzled from, under both the common law and statutory definitions of "fiduciary." *Chao v. Day*, 436 F.3d 234 (D.C. Cir. 2006) (stating in part that "[a]s the plans' agent, Day was bound by a broker's common law fiduciary duty to faithfully deliver the plans' assets to the insurer," *id.* at 237, and noting that "Day was far more than a mere custodian [of the plans' assets]; he was a broker who solicited, accepted, and then pilfered the plans' assets by reneging on his promise to purchase insurance for the plans' members," *id.* at 238). In light of our earlier decision, we uphold the District Court's determination that appellant abused a position of trust and thus warranted the sentencing enhancement contained in U.S.S.G. § 3B1.3.

D. Number of Victims

The Government sought to have appellant's sentence increased by four levels under U.S.S.G. § 2B1.1(b)(2)(B), because it alleged that there were more than 50 victims of appellant's embezzlement. However, the District Court only increased appellant's sentence by two levels under U.S.S.G. § 2B1.1 (b)(2)(A) (more than 10 victims), because the trial judge counted only the individual plans, not

every member of said plans, as "victims." Although fewer than 10 plans were identified in the superseding indictment, the District Court found that, when all of his "relevant conduct" was considered, appellant had in fact stolen from more than 10 plans. *See* Hearing Tr. (4/6/06 PM) at 14-17. The District Court's determination of appellant's "relevant conduct" was not clearly erroneous.

IV. CRIMINAL FORFEITURE

After the jury found appellant guilty of the substantive charges and appellant waived his right to have a jury determine whether the Government was entitled to the forfeiture sought, the Government decided that, in lieu of seeking specific property from appellant, it would pursue a $1.5 million money judgment. The Government relied only on the first forfeiture allegation in the superseding indictment to support its $1.5 million request. This allegation incorporated the entire mail and wire fraud scheme alleged in Counts 1-16 of the indictment. JA (Vol. 1) at 50-73 (Superseding Indictment); Br. for Appellee at 44-46. Appellant did not challenge the amount of money that the Government sought to recover, though he challenged the Government's ability to claim forfeiture on the mail and wire fraud counts and the Government's request for a money judgment in the amount of the forfeited property. The District Court held that forfeiture was appropriate on the embezzlement charges, but agreed with appellant that criminal forfeiture was unavailable on the mail and wire fraud counts. *Day*, 416 F. Supp. 2d at 85-88.

Determining whether forfeiture is an appropriate sanction for mail and wire fraud involves unraveling a series of tangled statutes. During the time period encompassing appellant's trial and sentencing, 28 U.S.C. § 2461(c) stated that, "[i]f a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged . . . with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment. . . and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in [21 U.S.C. § 853]." 28 U.S.C. § 2461(c) has since been amended so that its application to general mail and wire fraud charges can no longer be disputed. *See* USA PATRIOT Improvement and Authorization Act of 2005, Pub. L. No. 109-177, § 410, 120 Stat. 192 (2006). However, the newly amended statute was not in effect when Day was arrested, tried, and sentenced. The Government argues that this is no impediment to forfeiture, because § 2461(c) "requires the Court to order criminal forfeiture where a civil forfeiture is authorized, and [18 U.S.C. §] 981(a)(1)(C) in turn supplies the necessary authorization in this case." *Day*, 416 F. Supp. 2d at 86.

18 U.S.C. § 981(a)(1)(C) subjects property to civil forfeiture if it is obtained in violation of various listed statutes *or* if it is obtained as a result of "any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title)." Meanwhile, 18 U.S.C. § 1956(c)(7)(A) defines "specified unlawful activity" as including "any act or

activity constituting an offense listed in § 1961(1) of this title." And, finally, 18 U.S.C. § 1961(1)(B) - part of the Racketeer Influenced and Corrupt Organizations ("RICO") statute - defines "racketeering activity" to include any act that is "indictable under any of the following provisions of title 18," including sections 664 (the embezzlement/theft from employee benefit plans statute), 1341 (the mail fraud statute) and 1343 (the wire fraud statute). In short, the Government argues that criminal forfeiture is authorized for general violations of the mail and wire fraud statutes, as well as for embezzlement from employee benefit plans.

The District Court disagreed, noting that 28 U.S.C. § 2461(c) allowed the Government to seek criminal forfeiture *only* when "no specific statutory provision is made for criminal forfeiture upon conviction." The District Court found that there was a specific statutory provision applicable to criminal forfeiture in mail and wire fraud cases: 18 U.S.C. § 982(a)(2)(A) states that "[t]he court, in imposing sentence on a person convicted of a violation of [the mail or wire fraud statutes, §§ 1341 or 1343], affecting a financial institution, shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation." According to the District Court, since appellant's mail and wire fraud unquestionably did not affect financial institutions, § 982(a)(2)(A) would not authorize criminal forfeiture in appellant's case; by the same token, according to the District Court, § 982(a)(2)(A)'s specific application to mail and wire

fraud also prevented § 2461(c) from being used to secure criminal forfeiture in cases of this sort, involving general mail and wire fraud. As the District Court stated,

> The plain language of 28 U.S.C. § 2461(c) permits the government to seek criminal forfeiture of the property of a convicted person that would be subject to civil forfeiture, provided that "no specific statutory provision is made for criminal forfeiture upon conviction." Here, 18 U.S.C. § 982(a)(2)(A) is just such a specific statutory provision, authorizing criminal forfeiture upon conviction of mail and wire fraud. By its terms, therefore, Section 2461(c) does *not* authorize criminal forfeiture of mail and wire fraud proceeds.

Day, 416 F. Supp. 2d at 86.

We disagree with the District Court's reading of the relevant statutes. We find that criminal forfeiture is available for general mail and wire fraud violations, not merely those affecting financial institutions. We note that the District Court's decision *in Day* relied heavily on another district court's opinion - *United States v. Croce*, 345 F. Supp. 2d 492 (E.D. Pa. 2004) *(Croce II)* - which was overruled by the Third Circuit in *Vampire Nation*, 451 F.3d 189 (3d Cir. 2006). We agree with the Third Circuit's interpretation of the relevant statutes:

> To interpret the statute, we begin with its plain language. Ascribing plain meaning to the words of 28 U.S.C. § 2461(c), criminal forfeiture is not permitted unless (1) a substantive provision exists for civil forfeiture of the criminal proceeds at issue; and (2) there is no specific statutory provision that permits criminal forfeiture of such proceeds. Thus, we read the statute, enacted eight years after Congress last amended 18 U.S.C. § 982(a)(2), as a "bridge" or "gap-filler" between civil and criminal forfeiture, in that it permits criminal forfeiture when no criminal forfeiture provision applies to the crime charged against a particular defendant but civil forfeiture for that charged crime is nonetheless authorized. Accordingly, under our reading, § 2461(c) permits criminal forfeiture for general mail fraud because (1) 18 U.S.C. § 981(a)(1)(C) authorizes civil forfeiture for general mail fraud; and (2) no statutory provision specifically authorizes criminal forfeiture for general mail fraud.

Vampire Nation, 451 F.3d at 199 (internal citation, footnote omitted). *See also United States v. Jennings*, 487 F.3d 564, 584-85 (8th Cir. 2007) (holding that § 2461 allows for criminal forfeiture of the proceeds of general mail fraud). We find support for this reading of the applicable statutes in the legislative history of the Civil Asset Forfeiture Reform Act of 2000

("CAFRA"), which added subsection (c) to 28 U.S.C. § 2461. The House Report that accompanied an earlier version of CAFRA stated that:

> Current law limits civil forfeiture to certain enumerated federal crimes, and by doing so excludes a number of federal crimes that frequently generate criminal proceeds. Because [CAFRA] makes civil forfeiture procedures fair, and civil forfeiture generally should be available to combat federal crimes, it makes sense to extend the availability of forfeiture to these other crimes. Rather [than] simply making civil forfeiture available for all federal crimes, some of which do not generate criminal proceeds, the bill would amend sections 981(a)(1) and 982(a)(2) of title 18 to extend . . . forfeiture (both civil and criminal) to the crimes enumerated in the money laundering statute, 18 U.S.C. § 1956(c)(7).
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> . . . .
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> [CAFRA] would [also] amend section 2461 of title 28 to give the government the option of pursuing criminal forfeiture as an alternative to current civil forfeiture if civil forfeiture is otherwise authorized.

H.R. REP. NO. 105-358, pt. 1, at 35 (1997). This legislative history clarifies that the civil and

criminal forfeiture statutes were intended to be largely coterminous.

Criminal forfeiture is therefore available for general mail and wire fraud under 18 U.S.C. §§1341 and 1343, and not only for mail and wire fraud affecting financial institutions under 18 U.S.C. § 982(a)(2)(A). We find the District Court's interpretation of the statutes to be contrary to both their plain language and congressional intent.

V. MONEY JUDGMENT

Although the District Court held that the Government was not entitled to criminal forfeiture as a form of relief on the first forfeiture allegation for the general mail and wire fraud charges under 18 U.S.C. §§ 1341 or 1343, it found that the Government was entitled to forfeiture on the second forfeiture allegation for appellant's theft/embezzlement charges under 18 U.S.C. § 664. Nevertheless, the District Court refused to enter a money judgment against appellant for the amount of the total embezzlement charges (approximately $40,000) because it found that the applicable forfeiture statutes did not authorize the court to enter money judgments. The Government appeals this ruling.

As noted above, 18 U.S.C. § 2461(c) states that, in circumstances where criminal forfeiture is appropriate, "the court shall order the forfeiture of the property in accordance with the procedures set forth in ... 21 U.S.C. § 853," and 18 U.S.C. § 981(a)(1)(C) requires the forfeiture of "[a]ny

property, real or personal, which constitutes or is derived from proceeds traceable to" the violations in question. Neither of these statutory provisions specifically authorizes money judgments, which the trial judge believed to be fatal to the Government's argument. The District Court stated that the Government "[i]mplicitly acknowledg[ed] the lack of support for its position in the statutory language" by arguing that "the practice of entering forfeiture money judgments is established in the case law as a unique aspect of *in personam* criminal forfeiture. . . . [T]he Court finds no such authority emanating from the inherent nature of criminal forfeiture." *Day*, 416 F. Supp. 2d at 89. The District Court's decision once again rested on another district court opinion - *United States v. Croce*, 334 F. Supp. 2d 781 (E.D. Pa. 2004) *(Croce I)* - which was also overruled by the Third Circuit in *Vampire Nation*.

We hold that the District Court erred in denying the Government's request for a money judgment. Nothing in the relevant statutes suggests that money judgments are *forbidden*. Rather, "the open-ended nature of an order forfeiting the proceeds of an offense is implicit in both the mandatory nature of forfeiture and in the procedures Congress created for locating the forfeitable property itself, or for satisfying the forfeiture judgment with substitute assets." Br. for Appellee at 51; *see also* 21 U.S.C. § 853(b)(2) (property subject to criminal forfeiture includes "tangible and intangible personal property, including rights, privileges, interests, claims, and securities"); § 853(m) (authorizing courts to order depositions "to facilitate the identification and location of property declared forfeited"); § 853(p)

(stating that "substitute property" is also subject to forfeiture if, "as a result of any act or omission of the defendant," the directly forfeitable property "(A) cannot be located upon the exercise of due diligence; (B) has been transferred or sold to, or deposited with, a third party; (C) has been placed beyond the jurisdiction of the court; (D) has been substantially diminished in value; or (E) has been commingled with other property which cannot be divided without difficulty."). We find it instructive that 21 U.S.C. § 853 contains no language limiting the amount of money available in a forfeiture proceeding to those assets in the defendant's possession at the time forfeiture is ordered. As the Ninth Circuit recently noted, "[c]riminal forfeiture under § 853, by definition, bears a direct relation to the proceeds of the crime. [It] is concerned not with how much an individual has but with how much he received in connection with the commission of the crime." *Casey*, 444 F.3d at 1077. Additionally, § 853(o) states that "[t]he provisions of this section shall be liberally construed to effectuate its remedial purposes."

The First Circuit recently noted:

> There are two primary reasons for permitting money judgments as part of criminal forfeiture orders. First, criminal forfeiture is a sanction against the individual defendant rather than a judgment against the property itself. Because the sanction follows the defendant as a part of the penalty, the government need not prove that the defendant actually has the forfeited

> proceeds in his possession at the time of conviction. Second, permitting a money judgment, as part of a forfeiture order, prevents a [convicted defendant] from ridding himself of his ill-gotten gains to avoid the forfeiture sanction.

United States v. Hall, 434 F.3d 42, 59 (1st Cir. 2006) (internal quotation marks, citations omitted). Both the Third Circuit and the Ninth Circuit recently have held that money judgments are appropriate where the Government is entitled to criminal forfeiture, even where the amount of the money judgment exceeds the defendant's current assets. *See Vampire Nation*, 451 F. 3d at 201-03; *Casey*, 444 F.3d at 1077. In each case, the court noted the liberal construction required by § 853(o) *(see Vampire Nation*, 451 F.3d at 202 n. 12; *Casey*, 444 F.3d at 1073), and rejected the contrary view because it "would permit defendants who unlawfully obtain proceeds to dissipate those proceeds and avoid liability for their ill-gotten gains." *Vampire Nation*, 451 F.3d at 202; *see also Casey*, 444 F.3d at 1074. Furthermore, in the context of criminal forfeiture under the similar RICO forfeiture statute, 18 U.S.C. § 1963(a), the Second, Seventh, and Eleventh Circuits all agree that money judgments are available. *See, e.g., United States v. Robilotto*, 828 F.2d 940, 948-49 (2d Cir. 1987); *United States v. Ginsburg*, 773 F.2d 798, 799-803 (7th Cir. 1985) (en banc); *United States v. Conner*, 752 F.2d 566, 575-78 (11th Cir. 1985). We now join our sister circuits and hold that money judgments are appropriate in the criminal forfeiture context.

CONCLUSION

For the reasons indicated in the foregoing opinion, the judgments of the District Court are affirmed in part and reversed in part.

So ordered.

ENTERED May 8, 2006

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

BRITTIAN PERRY DAY,
Defendant.

Criminal No. 04-0358 (PLF)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant Brittian Perry Day's motion for release pending appeal pursuant to 18 U.S.C. § 3143(b). On April 20, 2005, after a jury trial, defendant was found guilty on all 22 counts of the indictment filed against him: six counts of mail fraud under 18 U.S.C. § 1341; ten counts of wire fraud under 18 U.S.C. § 1343; five counts of theft or embezzlement from an employee benefit plan under 8 U.S.C. § 664; and one count of fraud in the first degree under D.C. Code §§ 3221 and 3222. On April 6, 2006, the Court sentenced Mr. Day to 108 months' incarceration, followed by three years' supervised release. The defendant filed a

notice of appeal on April 17, 2006.

The relevant provision of the Bail Reform Act of 1984 states that the Court

> shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to . . . the community . . . and (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in: (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b). The government has never contended, and does not now argue, that Mr. Day is likely to flee, that he poses a danger to the community, or that his appeal was filed for purposes of delay. Nonetheless, the Court denies Mr. Day's motion for release because his appeal (as portrayed in his motion for bond) does not raise a substantial question of law or fact likely to result in reversal, a new trial, or a reduced sentence of imprisonment.

In considering a motion for bond pending appeal under 18 U.S.C. § 3143(b), the district court must follow a two-part inquiry: (1) Does the appeal raise a substantial question? (2) If so, would the resolution of that question in the defendant's favor be likely to lead to reversal? See United States v. Perholtz, 836 F.2d 554, 555 (D.C. Cir. 1988) (per curiam). A substantial question is "a 'close' question or one that very well could be decided the other way." Id. The sole ground for appeal raised in Mr. Day's motion for bond pending appeal is the Court's exclusion of four expert witnesses proffered by the defendant to testify as to Mr. Day's inability, as a result of medical and psychiatric conditions, to form the *mens rea* (specific intent) required for a mail or wire fraud conviction. The Court excluded the first three of these witnesses, Drs. Abbas Alavi, Arthur M. Horton, and Edgar Garcia-Rill, after a three-day hearing, on February 24, 2005. The Court excluded the final witness, Dr. Michael Spodak, after a two-day hearing, on March 25, 2005.[1]

A. Exclusion of Drs. Alavi, Horton, and Garcia-Rill

The first three experts proffered by the defendant and excluded by the Court were Dr. Abbas Alavi, a professor of radiology and nuclear medicine; Dr. Arthur M. Horton, a neuropsychologist; and Dr. Edgar Garcia-Rill, a neuroscientist. Defendant proposed to use the testimony of these three

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[1] The reasons underlying the Court's decisions were explained briefly in the Orders excluding the witnesses, and more expansively in open court.

witnesses to negate the *mens rea* element of the charged crimes by showing that, because of depression and the long-term effects of strokes and "transient ischemic attacks," Mr. Day was unable to formulate the specific intent required to commit the charged offenses. Accepting defendant's argument that this is a legally recognized defense, the Court conducted a Daubert hearing on February 18 and February 23, 2005 to consider the admissibility of the proffered testimony and heard oral argument on the issue on February 24, 2005.

On February 25, the Court issued an Order rejecting the proffered expert testimony on two related grounds: First, the Court concluded that the testimony was unreliable and unhelpful under Rule 702 of the Federal Rules of Evidence and the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). The defendant's key witness, Dr. Garcia-Rill, is not a medical doctor but a research scientist, and thus was unqualified to render a diagnosis of any psychiatric or medical condition from which Mr. Day might have been suffering at the time he committed the charged offenses.[2] Second, the proffered testimony failed to meet the standards governing the limited circumstances in which expert testimony as to *mens rea* is permissible, as articulated by the D.C. Circuit in United States v. Childress, 58 F.3d 693, 728 (D.C.

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[2] The other two witnesses, Dr. Alavi and Dr. Horton, did not purport to offer any diagnosis of Mr. Day, but simply reported and explained the results of examinations (a P.E.T. scan and a battery of neuropsychological tests) they had conducted on him. Their expert testimony thus did not stand alone; rather, Dr. Garcia-Rill incorporated their results into his "diagnosis" of Mr. Day.

Cir. 1995).

Defendant's appeal of this decision does not raise a "substantial question of law" under 18 U.S.C. § 3143(b) because the Court accepted the legal theory underlying defendant's *mens rea* defense. See, e.g., 2/23/05 Transcr. at 137:12-21. In fact, it instructed the jury on that theory at the conclusion of the trial.[3] In addition, while excluding the experts, the Court permitted defendant to present at trial lay witnesses who testified that they had witnessed a decline in Mr. Day's mental functioning in recent years.

The Court excluded the proffered expert testimony not on the basis of its resolution of a pure question of law, but on its consideration of the reliability of the expert testimony and expert reports, the relevance of this particular testimony to a legally acceptable theory of lack of *mens rea*, and

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[3] The jury was instructed on "Defendant's Theory of the Case" as follows:

> Defendant's theory of the case is that the evidence presented by the prosecution has not proved beyond a reasonable doubt that Mr. Day was able to form the specific intent to commit the crimes with which he is charged, given the emotional confusion caused by the deaths of his partner, James Apicella, and many of his friends, and the illness of Michael Burns, and the physical damages he suffered from strokes in 1996, 1999 and 2000, and that the evidence presented by the prosecution was insufficient to prove beyond a reasonable doubt the remaining elements of the crimes with which Mr. Day is charged in the counts of the superseding indictment.

its potential usefulness in helping the jury determine ultimate issues of fact. See United States v. Childress, 58 F.3d 693; United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987); United States v. Mezvinsky, 206 F. Supp. 2d 661 (E.D. Pa. 2002). These questions required close attention to the proffered testimony and careful analysis of the applicable standards under Childress and other cases, but the ultimate decision to exclude the proffered evidence was not a "close" one. See United States v. Perholtz, 836 F.2d at 555. Whatever relevance the proffered testimony might have had was significantly outweighed by its lack of reliability and potential to confuse the jury or induce it to consider an impermissible "diminished responsibility" defense. See United States v. Childress, 58 F.3d at 739.

Evidentiary determinations such as this one are reviewed by the court of appeals for abuse of discretion, and thus are less likely to result in reversal on appeal than a district court's resolution of an issue of law which is reviewed *de novo*. See Kumho Tire v. Carmichael, 526 U.S. 137, 141-42 (1999) (citing General Electric Co. v. Joiner, 522 U.S. 136, 143 (1997)) (district court's decision to exclude testimony under Daubert is reviewed for abuse of discretion); United States v. Childress, 58 F.3d at 728; United States v. Clarke, 24 F.3d 257, 268 (D.C. Cir. 1994) (trial court has "broad discretion regarding the admission or exclusion of expert testimony, and reversal of a decision on these matters is appropriate only when discretion has been abused"). Because defendant's appeal on this issue does not raise a "substantial" question of law or fact

likely to result in reversal, defendant is not entitled to bond on this basis.

B. EXCLUSION OF DR. SPODAK

On March 28, 2005, the Court excluded the proffered expert testimony of Dr. Michael Spodak, a forensic psychiatrist who examined Mr. Day and concluded that from 1999 through 2004, Mr. Day had suffered from psychiatric or neuropsychiatric conditions that impaired his critical judgment and ability to make complex plans and decisions. Defendant first announced his intent to proffer this testimony on March 13, 2005, and did not make Dr. Spodak's expert report available to the government and to the Court until March 17, 2005. Trial was scheduled to begin on March 29. The government filed a motion to strike Dr. Spodak's testimony, and the Court held a Daubert hearing on March 21, 24 and 25, 2005.

The Court excluded Dr. Spodak's testimony on two grounds: First, the defendant had failed manifestly to comply with Rule 16(b)(1)(C)(ii) of the Federal Rules of Criminal Procedure, which requires a defendant to provide, on the government's request, a written summary of expert testimony the defendant intends to use at trial. The Court concluded that, under the circumstances, exclusion of the evidence was an appropriate sanction for defendant's non-compliance with the Rule. Alternatively, the Court again found that the proffered evidence was inadmissible under United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), and Childress. See Order of March 29, 2005.

Unlike Dr. Garcia-Rill, Dr. Spodak was qualified to render a medical diagnosis of Mr. Day. Dr. Spodak's exclusion therefore was a somewhat closer question than the exclusion of the earlier witnesses. Nonetheless, the Court's balancing of the relevance and helpfulness of the evidence against its potential to confuse the jury is, in the Court's mind, not a question "that very well could [have been] decided the other way." United States v. Perholtz, 836 F.2d at 555. Furthermore, even if the exclusion of Dr. Spodak under Brawner and Childress raises a "substantial" question, a favorable ruling on appeal on that issue would not "be likely to lead to reversal" under 18 U.S.C. § 3143(b), because the primary ground for exclusion was defendant's failure to comply with Rule 16. While not undertaken lightly, the imposition of the sanction of exclusion is a discretionary determination that in this case was entirely appropriate (and which defendant does not purport to challenge on appeal). See United States v. Johnson, 970 F.2d 907, 912 (D.C. Cir. 1992) (exclusion of witness proffered by criminal defendant as a discovery sanction was decision within trial court's discretion) (citing Taylor v. Illinois, 484 U.S. 400 (1988)). Therefore, defendant's appeal of the exclusion of Dr. Spodak's testimony is insufficient to

justify defendant's request for bond.[4] Accordingly, it is hereby

ORDERED that [96] defendant's motion for release pending appeal is DENIED.

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: May 8, 2006

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[4] On May 4, 2006, defendant filed a supplement to his motion for release pending appeal, asserting that he has a "strong" issue on appeal based on the Supreme Court's May 1, 2006 holding in Holmes v. South Carolina, 2006 U.S. LEXIS 3454 (U.S. 2006). The Court disagrees. While Holmes reiterates the principle that the Constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote," id. at * 14, it also states explicitly that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Id. "[T]he Constitution permits judges 'to exclude evidence that is repetitive . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" Id. at *15 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)) (modifications in original). The standards articulated in Childress and Brawner constitute just such a "well-established rule of evidence," and defendant's appeal on this ground - if he chooses to pursue it - does not raise a substantial question of law.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	**)Criminal**
	)No. 04-0358
v.	**)(PLF)**
	)FILED
BRITTIAN PERRY DAY,	**)Feb 25 2005**
Defendant.	**)**

ORDER

This matter came before the Court on the defendant's proffer of expert testimony to support his claim that he was incapable of having the requisite mens rea or specific intent to commit some of the offenses for which he has been indicted. The defendant also moved to sever Counts 13, 14, 15, 16 and 22 from the remainder of the counts because he asserts that he has a factual defense to these counts, while his defense with respect to all of the other counts is that he lacked the requisite mens rea or specific intent to commit the crimes charged.

The Court heard testimony from three expert witnesses proffered by the defendant for two full days on February 18 and February 23, 2005. It heard oral argument with respect to the parties' respective positions on February 24, 2005. Upon consideration of the reports of the experts, the testimony of the experts, and the arguments of counsel, and for the reasons stated in open court, the

Court rejects the proffered medical testimony as unreliable and unhelpful (or irrelevant) under the requirements embodied in Rule 702 of the Federal Rules of Evidence and the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). See also United States v. Mitchell, 365 F.3d 215 (3d Cir. 2004), and Ambrosini v. LaBarraque, 101 F.3d 129 (D.C. Cir. 1996). As explained in open court, the Court also finds that the proffered testimony fails to pass muster under the case law governing the limited circumstances in which mens rea testimony is permitted by the courts, as articulated by this Circuit in United States v. Childress, 58 F.3d 693 (D.C. Cir. 1995). See also the particularly pertinent decisions in United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987), and United States v. Mezvinsky, 206 F. Supp. 2d 661 (E.D. Pa. 2002).

Since the only basis for the motion to sever is the inconsistency between the factual and mens rea defenses and the motion would be plausible only if the Court permitted the expert testimony now rejected, defendant's motion to sever also must be denied.

Accordingly, it is hereby

ORDERED that defendant's proffer of expert testimony with respect to mens rea is REJECTED; and it is

FURTHER ORDERED that defendant's motion to sever Counts 13, 14, 15, 16 and 22 from

the remaining counts in the Superseding Indictment is DENIED.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
DATE: 2/25/05 United States District Judge